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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 538

HERMAN BERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON HABEAS CORPUS

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Preliminary

The Government in its brief in opposition to certiorari concedes that (p. 14) "there is a conflict in principle between the Ninth Circuit's (the Court of Appeals below) interpretation of the conscientious objector's exemption (under Section 5 (g) of the Selective Training and Service Act) and the broad construction that the Second Circuit has given to that provision".¹

¹ The court below expressly acknowledged that conflict, and freely stated that it took "divergent views from those expressed in these cases" (R. 39). Judge Denman stated that the decision of the majority "on this important question of law is in conflict with the decision of the Second Circuit in

In the face of such a direct conflict, on an important question arising out of a Federal statute of wide application² this Court would ordinarily not hesitate to grant certiorari—particularly where the issue of religious freedom lies in the background of the case, as it does here.

The Government takes the position however, in effect, that the court below, sitting *en banc*, was in error in deciding the question (p. 15) “whether an objector to war whose objections do not stem from a sense of responsibility to divine authority is exempt from service”—an issue expressly ruled upon by the court below, and decided in direct conflict with decisions of the Second Circuit. Hence, argues the Government in its brief, this Court, in this case, “need not reach the (that) question which the court below decided” (p. 15).

And this is so, it is urged, because the administrative decision as to the petitioner “was grounded upon an interpretation of the statute which was entirely consistent with the decision of the Second Circuit” (p. 15), because, so the Government claims, the “triers of the facts found that he (the petitioner) was a political objector, not a conscientious objector” (p. 15). The court below did not so read the record. *The petitioner does not so read it.*

United States v. Downer, 135 Fed. (2d) 521 (C. C. A. 2, 1943). I am in accord with all that the Second Circuit there says and holds” (R. 56). (The decisions of the Second Circuit Court referred to are *United States v. Kauten*, 133 F. (2d) 703 (C. C. A. 2, 1943); *United States v. Downer*, 135 F. (2d) 521 (1943), and *United States v. Badt*, 141 F. (2d) 845 (C. C. A. 2, 1944). Cf. also *United States v. Badt*, 152 F. (2d) 627 (C. C. A. 2, 1945), certiorari dismissed on motion of Solicitor General, 66 S. Ct. 979, 90 L. Ed. 912).

² The Selective Training and Service Act covers a large portion of the inhabitants of the United States.

THE SHOWING BEFORE THE SELECTIVE SERVICE AGENCIES BY THE PETITIONER WAS TO THE EFFECT THAT HE WAS A CONSCIENTIOUS OBJECTOR, AS WELL AS A POLITICAL OBJECTOR, TO ALL WARS. HAD THE ADMINISTRATIVE AGENCIES FOLLOWED THE INTERPRETATION OF "RELIGIOUS TRAINING AND BELIEF" GIVEN BY THE SECOND CIRCUIT THE PETITIONER WAS ENTITLED TO A CLASSIFICATION AS A CONSCIENTIOUS OBJECTOR UNDER THE ACT.

It is true, as urged by the Government, that the hearing officers in the Selective Service System found that the petitioner was a political objector to war; it is further true that the petitioner was a political socialist. Neither is necessarily inconsistent with a finding that he is *also* a *religious* pacifist.³

A close reading of the record, and an intelligent analysis of the statements of the two hearing officers, disclose that *solely* because of the petitioner's lack of belief in a supernatural god was he denied the exemption claimed.⁴ Thus the first hearing officer, C. H. Hartke (Supp. Rec. 16-29), recommended the rejection of the petitioner's claim, because of a lack of showing that the petitioner in his activities had made an effort "to carry out the wishes of a divine providence." (Supp. Rec. 28.)

And the second hearing officer, J. R. Files (Supp. Rec. 29-34), seems to have taken essentially the same view when he concluded that "None of the deep-seated beliefs of Registrant as they were related at the hearing had any

³ Norman Thomas, author of "Is Conscience a Crime", friend, if not mentor, of the petitioner (R. 57), is clearly such a person. Judge Denman below called Thomas a "Presbyterian and long a clergyman in churches of that faith." Another outstanding example is Bishop Parsons of the Episcopal Church at San Francisco; he is a political socialist as well as a religious leader; and both a political and religious pacifist.

⁴ Hence the Selective Service agencies, as did the court below, erroneously construed and applied the phrase "religious training and belief" in the Act.

relation to worship, none comport with the generally accepted meaning of religious belief." (Supp. Rec. 32.)

For, except for the 16th century notion, accepted by the hearing officers, that "divine providence"⁵ is an indispensable element of religion, the findings of these very hearing officers are to the effect that the petitioner was essentially religious in his opposition to war, despite their formal conclusions that the petitioner should not be classified as a conscientious objector.

Thus, Hearing Officer C. H. Hartke stated "when asked of what his religion consisted he stated in substance that his principal religious belief was that of doing all the good he can for people in need, and to do everything he could to help his fellow-man—to do by others as he would be done by,' in other words, 'The Golden Rule'; to enter into all cooperative movements and efforts to help his fellow man to develop a democratic and socialistic form of life; that he had for the last few years and expected in the future to devote himself to this work, selling and distributing pamphlets and peace literature as mentioned above." (Supp. Rec. 23.) At another point Mr. Hartke states: "That the petitioner contended that socialism was his religion." Quoting the petitioner "My Socialist views are my religious views," he observes, "these views are not based upon any particular teaching of the Bible, but only that of the Golden Rule. He has lectured and debated this theory upon every opportunity and sent letters to the newspapers long before Pearl Harbor." (Supp. Rec. 24.)

And in his conclusions, the officer finds that: "Since he states socialism and his practice thereof constitutes his primary religion, then he could hardly be deemed more than a *religious pacifist* if such a religion rather than a

⁵ The court below thus put it: "that philosophy and morals and social policy without the concept of deity cannot be said to be religion" (R. 46).

conscientious objector by reason of religious training and belief." (Supp. Rec. 29.) *'Italics ours.'*)

In short, Officer Hartke, in effect, thus concedes that the petitioner is a religious pacifist as distinguished from a political pacifist; but concludes that the petitioner was not entitled to a classification as a conscientious objector, because as the hearing officer viewed it, the petitioner was not carrying out the "wishes of a divine providence." (Supp. Rec. 28.)

Again, the second hearing officer, J. R. Files, notes that "He (the petitioner) says that socialism is his primary religion, and without doubt that is true." (Supp. Rec. 34.)⁶ Moreover, the overwhelming and unchallenged evidence before the Selective Service agencies (all before this court in the Record, Supplemental Record, and exhibits) disclosed that the petitioner is a religious objector (except only his non-belief in a supernatural or personal god). All of the judges of the Circuit Court below so read the record.

Officer Hartke thus reviewed some of the evidence before him:

"(b) A letter by Ernest Caldecott, Minister of the First Unitarian Church;

"(c) A letter by Reverend Allan A. Hunter, of the Hollywood Congregational Church. Each of these ministers indicate their confidence in registrant's sincerity.

"(d) Mrs. John Beardsley also vouches for registrant's sincerity as does Irving Dolin, and states as do some of the others that registrant expressed himself in this regard before the declaration of war.

⁶ Although stating that certain pamphlets distributed by the petitioner disclosed "vigorous and crusading opposition . . . to this war" (Supp. Rec. 32), Mr. Files found that the petitioner "is against war in any form" (Supp. Rec. 31); the Circuit Court below agreed that he was opposed to all war (R. 39).

“(e) Harold Slocum, Associate Minister of the Hollywood Congregational Church, is of the same tenor; in addition, he states that ‘these convictions are fundamentally based on religious beliefs, even though he is not attached to our particular Church’ . . .

“(f) Edwin P. Ryland, Minister, vouches for registrant’s sincerity but does not add anything else to the situation.

“(g) A letter from Norman Thomas, dated October 19, 1942 states: ‘I have never discussed specifically with him his position on war, but I have known of his deep sincerity. He holds his convictions with religious fervor and he tries to make his conduct conform to his convictions. It is to this quality of sincerity that I am bearing witness.’

“Registrant states that in connection with his work as a member of these various organizations and on his own (fol. 25) accord, independently thereof, he has spent much time in doing what he could to alleviate the suffering of the poor and distressed, soliciting clothing, wearing apparel, shoes, suits, etc., for the poor laborers and farmers, shipping it to them; gathering books and various necessities which could be used by share-croppers and people unfortunate financially and in need of various necessities; stating that he has not only personally gone from door to door but appealed for gifts of this sort from various sources, accumulating it and gathering this material in whatever means he could personally, thereafter distributing same among the needy at his own expense.” (Supp. Rec. 22-23.)

Mr. Hartke accepted as true the petitioner’s statement: “Therefore, for the sake of humanity and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort” (Supp. Rec. 16), accompanying the petitioner’s conscientious objector’s form (Supp. Rec. 20); and that

the petitioner was "engaged in an energetic crusade and work" and that this work was not only "political" but was also "humanitarian"⁷ (Supp. Rec. 18).

From the showing before him, Hearing Officer Files concluded that the petitioner "has plenty of courage; he is, and long before Pearl Harbor was, willing to espouse his opposition to war whether the case was popular or unpopular, whether practical or impractical. If he stood alone he would oppose this war and would fight our participation in it as zealously—even with equal futility—as King Canute, who tried to turn back the tides; all of this I believe regarding the conduct and the character of Registrant" (Supp. Rec. 33).⁸

⁷ Cf. the findings of the Hearing Officer in *United States ex rel. Beil v. Badt*, 141 F. (2d) 845 (C. C. A. 2, 1944) that: "Even though he (the petitioner) be a sincere philosophic humanitarian, which may be regarded as a sociological concept of the highest order, nevertheless his conviction does not come within either the terms or the intent of the statute" (at p. 847). Nonetheless, the Second Circuit rejected the Hearing Officer's views as being too narrow a construction of the phrase "religious training and belief."

⁸ The petitioner's Selective Service file discloses a letter in it, dated January 15, 1944, from professor Walter C. Muelder, then Professor of Christian Theology and Christian Ethics at the University of Southern California, Graduate School of Religion, which thus speaks of the petitioner:

"Mr. Berman is a Socialist, and like many Socialists is unalterably opposed to war and to methods of violence. He has a deep sense of reverence for life and for the sacredness of personality. Like most socialists that refuse to participate in so-called 'capitalistic' wars, he affirms that the dominant economic system inevitably fosters war along with its ruthless competition, exploitation of persons, class conflict, and imperialism. *His reaction is not simply one of political or economic displeasure, but a total spiritual protest against the war system and all its causes along with a wholehearted commitment to a society which shall be thoroughly democratic. There is no doubt in my mind that Socialism is a way of life for Mr. Berman and is pursued with no ulterior motives*" (Supp. Rec. 41). (Italics supplied.)

Further views of Professor Muelder are set forth in Appendix D to the Petition for the Writ of Certiorari herein. [They may be of interest to this court.]

Clearly, therefore, while falling short of the narrow definition of "religious training and belief" applied by the Selective Service agencies, and approved by the Circuit Court below, the petitioner does come within the broad definition of that phrase given by the Second Circuit.

For the record before the Selective Service agencies discloses that the evidence submitted by the petitioner before such agencies is to the unqualified effect that the petitioner showed, both in belief and in act, a deep and compelling "inner mentor", which, according to the Second Circuit, is the equivalent of a "religious impulse", and constitutes "religious training and belief" (*Kauten v. United States*, 133 Fed. (2d) 703, 708 (C. C. A. 2, 1943).⁹

Accordingly, this court should grant certiorari to resolve the conflict in the decisions between the Second and Ninth Circuit Courts of Appeals.

Respectfully submitted,

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⁹ Moreover, the rejection of the petitioner's claim to be classified as a conscientious objector is in direct conflict with the standard and definition of "religious training and belief" established by the Selective Service System itself. (See Petition for Writ of Certiorari, p. 12; see also brief of American Civil Liberties Union, amicus curiae, herein, at p. 8.)